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JOHN BRUCE HUBBARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioner's convictions under 18 U.S.C. 1001 for knowingly making false statements in pleadings filed with the bankruptcy court are barred by the so-called "judicial function" exception to Section 1001.

2. Whether petitioner's convictions under 18 U.S.C. 1001 are barred by the "exculpatory no" doctrine.

3. Whether the court of appeals erred in rejecting petitioner's claim of ineffective assistance of counsel without remanding the case to the district court for an evidentiary hearing.

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OCTOBER TERM, 1994

No. 94-172

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 16 F.3d 694.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1994. A petition for rehearing was denied on March 30, 1994. Pet. App. 20. On May 10, 1994, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 28, 1994. The petition for a writ of certiorari was filed on July 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts of bankruptcy fraud (Counts 1-4), in violation of 18 U.S.C. 152; three counts of making false statements in a matter within the jurisdiction of a federal department (Counts 5-7), in violation of 18 U.S.C. 1001; and three counts of mail fraud (Counts 8-10), in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of 24 months' imprison-ment on Counts 1 through 9, and to a consecutive term of five years' probation on Count 10. The court of appeals affirmed.

1. On September 25, 1985, petitioner filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In connection with the ensuing bankruptcy proceedings, the trustee filed an amended complaint against petitioner, after being informed that petitioner had failed to disclose certain property that he owned or possessed. Pet. App. 2; Gov't C.A. Br. 13. Among other things, the amended complaint alleged that a well-drilling machine was stored at petitioner's residence and that parts to the machine were stored in a nearby warehouse. *Id.* at 15. Petitioner responded in a formal pleading, entitled "Debtor's Answer to Trustee's First Amended Complaint," denying each allegation "for the reason [that] it is untrue." *Ibid.*; Pet. App. 4.

The trustee filed, in addition, a motion to compel petitioner to surrender the books and records of his businesses, Pet. App. 2, alleging that "despite requests of the Trustee, the Debtor has refused to surrender all books, documents, records and papers relating to property of the Estate to the Trustee," Gov't C.A. Br. 14. Petitioner filed a response, denying the allegation and

asserting that he had produced the requested documents to a previous bankruptcy trustee. Pet. App. 4; Gov't C.A. Br. 14.

2. On July 5, 1990, petitioner was charged by a grand jury with bankruptcy fraud, mail fraud, and making false statements in a matter within the jurisdiction of the federal bankruptcy court. Pet. App. 2. The false statement counts were based on the statements made by petitioner in his response to the bankruptcy trustee's motion to compel and in his answer to the trustee's amended complaint. *Id.* at 4. The evidence at trial showed that when petitioner filed his answer, he knew that the well-drilling machine and machine parts were stored at the locations specified in the amended complaint. Gov't C.A. Br. 15-16. In addition, the evidence demonstrated that petitioner had not produced the requested books and records to either the original or the successor trustee. *Id.* at 14-15. The jury convicted petitioner on all counts of the indictment. Pet. App. 2.

3. On appeal, petitioner argued that he was improperly convicted under 18 U.S.C. 1001 because his false statements fell within "exculpatory no" and "judicial function" exceptions to that statute. The court of appeals dismissed petitioner's "exculpatory no" argument based on the court's prior decision in *United States* v. *Steele*, 933 F.2d 1313, 1319-1322 (6th Cir.) (en banc), cert. denied, 112 S. Ct. 303 (1991). Pet. App. 6.

Turning to the so-called "judicial function" exception, the court noted that several courts of appeals have held that Section 1001 can be violated by false statements made in connection with "administrative matters of the courts, but not the judicial functions of those courts." Pet. App. 9-10 (citing cases). After analyzing the origins of and stated rationale for the exception, the court declined to adopt it. Noting that there is no basis in the

text or legislative history of Section 1001 for limiting the statute in that fashion, the court concluded that "the judicial function exception does not rest on solid legal ground." *Id.* at 13; see also *id.* at 11 n.5.

Petitioner also claimed that his trial counsel's performance was so deficient that it denied him effective assistance of counsel. At the outset, the court of appeals noted that it would address on direct appeal an ineffective assistance of counsel claim that was not raised in the district court only where "the record on appeal is adequate to assess the merits of the defendant's allegations." Pet. App. 16. Here, the court stated, the record was sufficient to permit it to consider petitioner's claim. *Ibid.* On the merits, the court found that petitioner made "a persuasive case for the incompetence of his trial counsel." *Id.* at 17. The court concluded, however, that reversal was not warranted, because "in light of the evidence against [petitioner] and the type of errors committed by his counsel," there was "no reasonable probability that but for his counsel's errors the result of his case would have been different." *Ibid.*

Judge Nelson dissented on the "judicial function" exception issue. Pet. App. 18-19. In his view, the circuit had held broadly in *United States* v. *Erhardt*, 381 F.2d 173 (6th Cir. 1967) (per curiam), that Section 1001 "does not apply to conduct engaged in by the defendant in connection with the operation of a court's judicial machinery." Pet. App. 19 (internal quotation marks omitted). Because petitioner's false statements were made in an adjudicative context, Judge Nelson believed that *Erhardt* controlled and precluded petitioner's conviction.

ARGUMENT

1. Petitioner contends (Pet. 15-16) that this Court should grant review to resolve a conflict among the circuits as to whether 18 U.S.C. 1001 applies to statements made in matters within the jurisdiction of the Judicial Branch that implicate a court's judicial function. We believe that the Sixth Circuit was correct in refusing to adopt any such "judicial function" exception to Section 1001. We recognize, however, that several courts of appeals have adopted some form of "judicial function" exception,[1] although other courts have expressed doubts as to its validity.[2] In light of the conflict among the circuits as to the construction of this important federal statute, we agree that the issue merits this Court's review.

a. Section 1001 provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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[1] See *United States* v. *Masterpol*, 940 F.2d 760 (2d Cir. 1991); *United States* v. *Holmes*, 840 F.2d 246 (4th Cir.), cert. denied, 488 U.S. 831 (1988); *United States* v. *Abrahams*, 604 F.2d 386 (5th Cir. 1979); *United States* v. *Mayer*, 775 F.2d 1387 (9th Cir. 1985); *United States* v. *Wood*, 6 F.3d 692 (10th Cir. 1993).

[2] See *United States* v. *Barber*, 881 F.2d 345, 350 (7th Cir. 1989), cert. denied, 495 U.S. 922 (1990); *United States* v. *Poindexter*, 951 F.2d 369, 387 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 656 (1992).

The so-called "judicial function" exception to Section 1001 originated in dictum from *Morgan* v. *United States*, 309 F.2d 234 (D.C. Cir. 1962), cert. denied, 373 U.S. 917 (1963). In *Morgan*, the District of Columbia Circuit upheld the conviction under Section 1001 of a layman who had falsely held himself out as an attorney in various court proceedings. The defendant argued on appeal against application of the statute to statements made within the jurisdiction of the Judicial Branch, contending that such application would criminalize traditional trial tactics. He claimed, for example, that the statute's false statement proscription would make a criminal offense out of a plea of "not guilty" or a lawyer's summation on behalf of a guilty client. 309 F.2d at 237. Responding to that concern, the court of appeals noted its belief that "neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.'" *Ibid.* The statute's application to "traditional trial tactics" was not presented in the *Morgan* case, however, as the court held "only * * * that the statute does apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court." *Ibid.*[3]

Since *Morgan*, courts have extended the "judicial function" exception beyond traditional trial tactics to

[3] The District of Columbia Circuit has since distanced itself from *Morgan*'s dictum, expressing "doubt that the 'traditional trial tactics' rationale of that case shields from criminal responsibility a defendant who knowingly makes a material false statement of fact in a judicial proceeding." *United States* v. *Poindexter*, 951 F.2d at 387 (refusing to create a parallel "legislative function" exception to the statute).

apply to knowing lies made to a court whenever the court is performing an adjudicative function. Courts recognizing the exception have, for instance, reversed the Section 1001 convictions of a defendant who knowingly provided false information to FBI agents in the course of a grand jury investigation, *United States* v. *Wood*, 6 F.3d 692, 694-695 (10th Cir. 1993), a defendant who lied to a magistrate judge about his aliases and his arrest record at a bail hearing, *United States* v. *Abrahams*, 604 F.2d 386, 393-394 (5th Cir. 1979), and a defendant who submitted wholly fictitious letters of recommendation to a sentencing court, *United States* v. *Mayer*, 775 F.2d 1387, 1391-1392 (9th Cir. 1985). At the same time, the courts that have recognized the "judicial function" exception have applied it only to false statements made in the course of courts' adjudicative functions, and not when made in the course of the courts' performance of administrative functions, even though the distinction between those functions has often proved elusive. Compare, *e.g.*, *United States* v. *Holmes*, 840 F.2d 246, 248-249 (4th Cir.) (false statements regarding identity made to magistrate judge at plea hearing fall within the court's administrative sphere), cert. denied, 488 U.S. 831 (1988) with *United States* v. *Abrahams*, 604 F.2d at 393 (false statements regarding identity made to magistrate judge at bail hearing fall within "judicial function" exception). The courts have disagreed on whether the exception applies to false statements by nonparties, compare *United States* v. *Wood*, 6 F.3d at 695 (exception shields false statement by potential witness) with *United States* v. *Barber*, 881 F.2d 345, 350 (7th Cir. 1989) (to the extent exception is valid, it would not shield false statements made to sentencing judge in another defendant's case), cert. denied, 495 U.S. 922 (1990). And while the exception has not been applied to statements made outside of the

confines of the Judicial Branch, *e.g.*, *Stein* v. *United States*, 363 F.2d 587, 589-590 (5th Cir.) (applying Section 1001 to false statements made to the Tax Court), cert. denied, 385 U.S. 934 (1966), it has been suggested that the rationale for the exception applies equally to statements made in the context of agency adjudicative proceedings. *United States* v. *Mayer*, 775 F.2d at 1390 n.2.

b. The "judicial function" exception, together with its qualifications and limitations, finds no grounding in the language of Section 1001. This Court has explained that the term "department," as it is used within the statute, encompasses the Executive, Legislative, and Judicial Branches. *United States* v. *Bramblett*, 348 U.S. 503, 509 (1955). The plain text of the statute reaches any false statement "in any matter within the jurisdiction of any department." That broad language does not create or permit distinctions based on the functional nature of the "matter" at issue. Indeed, no court that has adopted the "judicial function" exception has attempted to square the exception with the statutory text.

Nor can the "judicial function" exception be justified as necessary to protect legitimate trial prerogatives. The application of criminal penalties to intentional false statements neither impairs the presumption of innocence nor inhibits legitimate advocacy. Contrary to the defendant's suggestion in *Morgan*, a plea of "not guilty" could not come within the purview of the statute, because it is not a statement of fact, but rather a formal notice of nonacquiescence. And defense counsel may forcefully attack the probity of the government's evidence and challenge the government's failure to prove guilt beyond a reasonable doubt without resort to knowing falsification. Like the Sixth Circuit, we do not

believe that a prohibition on lying to the court constitutes an undue restriction of trial tactics.[4]

In *United States* v. *Rodgers*, 466 U.S. 475 (1984), this Court recognized that several courts of appeals had adopted a "judicial function" exception to Section 1001. *Id.* at 483 n.4. Because the exception was not at issue in *Rodgers*, the Court "express[ed] no opinion on the validity of [that] line of cases." *Ibid.* The Sixth Circuit's rejection of the "judicial function" exception has now created a conflict among the circuits on the issue. Particularly in view of the further conflicts and confusion generated by the courts' attempts to delineate the scope of the judge-made exception, we believe that the question of its core legitimacy warrants this Court's review.

2. Petitioner also argues (Pet. 17) that the Court should grant review to resolve a conflict among the circuits concerning the validity of the so-called "exculpatory no" exception to Section 1001. Courts that have adopted that exception have held that Section 1001 does not apply to simple denials of guilt by the target of a government investigation. See *United States* v. *Moore*, 27 F.3d 969, 978 & n.6 (4th Cir. 1994) (citing cases from the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits that have adopted the "exculpatory no" doctrine in some form). Along with the Sixth Circuit, the Fifth Circuit has rejected the "exculpatory no" exception as inconsistent with the plain language of Section 1001. See *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1045 (5th Cir. 1994) (en banc).

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[4] See Pet. App. 4 n.3 ("[W]hether or not it is a 'traditional trial tactic' to answer a complaint with affirmative falsehoods, we need not sanction such action and therefore will not create an exception so broad as to include [petitioner's] conduct.").

The disagreement among the circuits about the existence of an "exculpatory no" exception to Section 1001 may warrant review in an appropriate case. This case is not well suited to that task, however, because the facts of this case would not call for application of the "exculpatory no" doctrine under the law of any circuit.

Most cases applying the "exculpatory no" doctrine have involved direct interrogation by law enforcement authorities in the course of a criminal investigation. See, *e.g.*, *United States* v. *Equihua-Juarez*, 851 F.2d 1222 (9th Cir. 1988) (post-arrest questioning); *United States* v. *Cogdell*, 844 F.2d 179 (4th Cir. 1988) (questioning by Secret Service agent investigating fraudulent application for replacement tax refund check). The remaining cases have involved questions intended to uncover potential criminal violations. See, *e.g.*, *United States* v. *Schnaiderman*, 568 F.2d 1208 (5th Cir. 1978) (defendant falsely denied he was carrying more than $5,000 in response to question at border checkpoint); *United States* v. *Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982) (defendant falsely denied on tax return that he had foreign bank accounts; purpose of question on tax return was to uncover activity "linked to criminal activity in the United States"), cert. denied, 461 U.S. 927 (1983).

The false statements at issue in this case, by contrast, were made in response to a bankruptcy trustee's attempts to account for and collect the assets of the estate. See Pet. App. 2, 4; 11 U.S.C. 704. Not only were the trustee's queries not propounded in the course or contemplation of a criminal prosecution, they were not government questions at all. The trustee was the representative of the estate, 11 U.S.C. 323(a), not the representative of a governmental entity, and certainly not the representative of a criminal investigative entity.

Moreover, while the "exculpatory no" doctrine is concerned with "respons[es] to inquiries initiated by [the government]," *United States* v. *Cogdell*, 844 F.2d at 183, in this case it was petitioner who initiated the dialogue. Petitioner voluntarily filed for Chapter 7 protection, and his false pleadings were filed in an attempt to conceal his assets from the trustee and the court. Cf. *United States* v. *Moore*, 27 F.3d at 979 ("exculpatory no" doctrine "does not extend to misleading exculpatory stories or affirmative misstatements").

3. Finally, petitioner contends (Pet. 18-22) that the court of appeals erred in rejecting his ineffective assistance of counsel claim on the ground that he could not show that he was prejudiced by his trial counsel's sub-par performance. Petitioner claims that the court should have afforded him an opportunity to prove prejudice in the district court in a proceeding under 28 U.S.C. 2255. That contention is without merit. In his brief to the court of appeals, petitioner asserted that the trial record was adequate to support his claim that he was prejudiced by his counsel's deficient performance. He stated, without equivocation: "[T]here is no need for a post-conviction proceeding under 28 U.S.C. § 2255." Pet. C.A. Br. 34, 47. Having raised his ineffective assistance of counsel claim in the court of appeals, petitioner cannot fault the court for having ruled on it.

CONCLUSION

The petition for a writ of certiorari should be granted as to Question 1. In all other respects, the petition should be denied.

Respectfully submitted.

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